**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

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| STATE OF DELAWARE | ) | |
| | ) | |
| v. | ) | ID No. 0001012941 |
| | ) | |
| JAMES CAULK, | ) | |
| | ) | |
| Defendant. | ) | |

Submitted: April 3, 2006
Decided: July 28, 2006

**On Defendant's *Pro Se* Motion for Postconviction Relief. DENIED.**

**ORDER**

Brian J. Robertson, Deputy Attorney General, Wilmington, Delaware 19801.

James Caulk, Delaware Correctional Center, 1181 Paddock Road, Smyrna, Delaware 19977. *Pro se.*

**CARPENTER, J.**

On this 28th day of July, 2006, upon consideration of Defendant's Motion for Postconviction Relief it appears to the Court that:

1. James R. Caulk, ("Defendant"), has filed a *pro se* Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 61 ("Rule 61"), to which the State has responded. At the request of the Court, Defendant's attorney, Edmund M. Hillis, Esquire ("Counsel"), filed an affidavit refuting the allegations of ineffective assistance of counsel. For the reasons set forth below, Defendant's Motion for Postconviction Relief is **DENIED**.

2. On May 8, 2001 a two-day trial commenced resulting in the Defendant being found guilty of two counts of Assault First Degree, three counts of Possession of a Deadly Weapon During the Commission of a Felony, one count of Robbery First Degree and one count of Conspiracy Second Degree. The Defendant was sentenced for these crimes on July 6, 2001. Thereafter, Mr. Caulk's appeal to the Supreme Court of Delaware was denied, and a mandate was issued on April 15, 2002.

3. Consequently, on April 8, 2005, the Defendant filed this motion for postconviction relief. As previously indicated, both the State and trial counsel have filed responses to Mr. Caulk's motion, to which Mr. Caulk has filed a reply. Mr. Caulk's motion asserts claims for ineffective assistance of counsel and abuse of discretion by the Court. The Court finding no procedural bars to preclude the

Defendant's motion, each ground of Mr. Caulk's motion will be reviewed on its merits.

**Ineffective Assistance of Counsel**

4. A motion filed pursuant to Rule 61 asserting ineffective assistance of counsel must meet the two-part test set forth in *Strickland v. Washington*.[1] A defendant must show first that the representation provided at trial or on appeal was deficient, and second, that the deficiency of counsel resulted in prejudice to the defendant.[2] A "strong presumption that the representation was professionally reasonable," must be overcome by the defendant in meeting this test, and as such the defendant must assert more than mere conclusory claims.[3] This strong presumption causes the Court to further presume the actions of counsel were employed as trial strategy, and thus they will not be questioned by this Court simply because it proves unsuccessful.[4] But even if a defendant can overcome this presumption and establish the representation he received was not objectively reasonable, the defendant must further establish that the errors committed by counsel were so serious that the

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[1] *Strickland v. Washington*, 466 U.S. 668, 694 (1984).
[2] *Id.* at 687.
[3] *Evans v. State*, 795 A.2d 667 (Del. 2002).
[4] *State v. Wright*, 653 A.2d 288, 297 (Del. Super. Ct. 1994) ("Although defense counsel's strategy, in retrospect, was unsuccessful, it is not proper for this Court to determine ineffectiveness based on outcome." citing *Lockhart v. Fretwell*, 506 U.S. 364 (1993)).

defendant was deprived of a fair trial causing its outcome to be unreliable.[5] In the case at hand, the Defendant raises four specific claims of ineffective assistance of trial counsel, and one claim of ineffective assistance of his appellate counsel.[6] For each of his claims, the Court finds for the reasons set forth below that the defendant has failed to overcome these presumptions, and as such, his motion will be denied.

**A. Failure of Trial Counsel to Effectively Cross-Examine the Victim**

5. Defendant first asserts his trial counsel was ineffective because he failed to aggressively cross-examine Christopher Bowe, thereby failing to provide the jury a reason to doubt Mr. Bowe's credibility. Within this claim, Mr. Caulk alleges that Mr. Bowe committed perjury when he testified that he was attempting to purchase cocaine from the Defendant the night of the robbery, and Mr. Caulk's counsel failed to bring this fact to light during the trial. Mr. Caulk contends Mr. Bowe was actually attempting to buy crack, not cocaine, and this distinction was allegedly shared with his trial counsel. But regardless of whether Mr. Caulk's allegations are true, it is questionable, and extremely doubtful, that this minute distinction would affect the credibility assessment of the victim in the jury's mind. The decision of counsel to not quibble with the witness over whether he attempted to purchase crack or powder cocaine from his client was sound trial strategy and does not rise to the level of

[5] *Strickland*, 466 U.S. at 686.
[6] Mr. Hillis was counsel for both the trial and appeal proceedings.

ineffective assistance of counsel.

Despite not attacking Mr. Bowe's credibility regarding the type of drug he attempted to purchase from the Defendant, Mr. Hillis did effectively question Mr. Bowe with respect to a number of other credibility issues. For instance, on direct examination, Mr. Bowe testified that he was attempting to purchase cocaine the night of the robbery,[7] and that when he was questioned by the police, he did not disclose this fact.[8] On cross-examination, Mr. Hillis questioned Mr. Bowe about his failure to be candid and honest with the police regarding his drug activity on the night of the robbery.[9] Trial counsel further questioned Mr. Bowe's memory regarding the events

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[7]Trial Tr. vol. 1, 74-6, May 8, 2001.

[8]On direct examination, the prosecutor and Mr. Bowe had the following exchange:

Q. . . . You did tell the police on the tape, though, that you were not out that night looking for drugs; is that right?

A. Right.

Q. Is that - - is what you said today true or is that true? In other words - -

A. What I said today was true.

Q. Why didn't you tell - - why did you lie to the police officer?

A. Because I didn't want him to know that I was out looking for drugs.

Trial Tr. vol. 1, 94, May 8, 2001.

[9]Mr. Hillis asked Mr. Bowe on cross-examination the following:

Q. Now, the prosecutor asked you about you having responded to the police officer's question about whether or not you went out to look for drugs by saying no, and now, today, you come and say that, in fact, you were.

A. Yes.

Q. What made you decide to tell the truth here today?

A. Because I sweared on the Bible.

Q. Okay. Well, let me ask you this. Before you swore on the Bible, did anyone tell you that you might be challenged about that today?

A. No.

Q. Nobody?

A. No.

on the night of the incident, including questioning how he knew one of the three assailants was Mr. Caulk,[10] particularly in light of Mr. Bowe's drug use and alcohol consumption the night of the robbery.[11] Mr. Hillis attacked Mr. Bowe's credibility effectively and within the reasonable standard expected of counsel.

Lastly, in his closing argument, counsel reiterated the inconsistencies between Mr. Bowe's statement to the police and his testimony in court in an attempt to again reinforce for the jury that Mr. Bowe's in-court testimony was not reliable. He further

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Trial Tr. vol. 1, 97-9, May 8, 2001.

[10]Trial Tr. vol. 1, 97, May 8, 2001.

[11]On cross-examination, Mr. Bowe testified:

Q. How long had you been at the bar . . . the evening that you suffered the injuries?
A. I got there about 9 o'clock.
Q. And you drank until closing at 1?
A. Yeah.
Q. What were you drinking?
A. Beer.
Q. Okay. Now you also testified that at some point that day you had done some cocaine?
A. Yes.
Q. Okay. What kind of cocaine did you do? Crack?
A. Coke.
Q. Snorted up your nose?
A. Yes.
Q. And when had you last done that?
A. It was around 8 o'clock.
Q. Okay. So you snort some coke, drank for several hours. Did you do any heroin?
A. The day before.

Trial Tr. vol. 1, 102-3, May 8, 2001.

emphasized Mr. Bowe's possible intoxicated state from the alcohol he consumed and the cocaine he ingested that night.[12] Despite Mr. Caulk's insistence, the record reflects that trial counsel vigorously and reasonably questioned the victim in an attempt to discredit his damaging testimony.

6. Next, the Defendant asserts trial counsel's cross-examination of Mr. Bowe was deficient because he failed to effectively challenge Mr. Bowe's testimony as to why the assailants did not take any money or his coat. First, any response that Mr. Bowe could have given would have been speculative as to why the defendant or others acted in a particular way, and thus it would have been inappropriate and unhelpful for counsel to significantly pursue this issue with the victim. Second, trial counsel did inquire about the disappearance of the coat with Mr. Bowe on cross-examination:[13]

> Q. (Mr. Hillis) Did you ever get your coat back?
> A. (Mr. Bowe) No.
> Q. Do you know what happened to your coat?
> A. It got tooken.

Therefore, trial counsel did address the issue, and getting an unfavorable answer, counsel chose to not belabor the point. This was a reasonable decision by counsel.

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[12]Trial Tr. vol. 2, 69, May 9, 2001.
[13]Trial Tr. vol. 1, 103, May 8, 2001.

As previously stated, the Defendant carries the burden of showing both that trial counsel did not act within an objectively reasonable standard, and that the acts of the attorney prejudiced the Defendant. In reviewing these claims, the Court will again not look at trial counsel's acts in hindsight, but will view his conduct at the time of the trial. In this case, the Defendant fails to show that Mr. Hillis' questioning of Mr. Bowe was unreasonable under the circumstances, nor that it resulted in prejudice to the Defendant. The fact that the effort to discredit Mr. Bowe in an attempt to cause the jury to doubt his testimony was unsuccessful is not grounds for a claim of ineffective assistance of counsel. As such, Mr. Caulk's assertion of ineffective assistance of counsel fails both prongs of the Strickland test.

**B. Failure of Trial Counsel to Introduce the Victim's Criminal History**

7. Mr. Caulk next asserts his trial counsel was ineffective because counsel failed to question Mr. Bowe regarding his criminal history. Pursuant to D.R.E. 609, a witness may be impeached by evidence of a felony conviction or a conviction which involved dishonesty.[14] Counsel advised the Court that he reviewed the Court's

[14]Delaware Uniform Rules of Evidence Rule 609 states, in pertinent part: Impeachment by evidence of conviction of crime. (A) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted but only if the crime (1) constituted a felony under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect or (2) involved dishonesty or false statement, regardless of the punishment.

database which indicated that Mr. Bowe did in fact plead guilty to a misdemeanor simple possession charge in 1997.[15] Because Mr. Bowe pled guilty to a misdemeanor, and because drug-related convictions are normally not considered crimes of dishonesty or false statements as defined within this rule,[16] the information Mr. Caulk would have liked trial counsel to elicit from Mr. Bowe would have been inadmissible. As such, counsel's decision not to pursue this area does not provide a basis to challenge his effectiveness.

### C. Failure to Interview and Depose State's Witnesses

8. Mr. Caulk also asserts counsel failed to interview and depose state's witnesses, or to further investigate the crimes because counsel merely accepted the state's version of facts. Mr. Hillis's affidavit indicates that, aside from obtaining the Defendant's version of facts, further investigation was not needed. Based on the crimes involved, it seems apparent the only potential witnesses to the crimes were the additional perpetrators, the Defendant and the two victims. The Defendant does not indicate who should have been interviewed, aside from Mr. Bowe or Mr. Rogers,[17] and even if for some unexplainable reason they would want to cooperate and be

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[15]Trial Tr. vol. 1, 84-5, May 8, 2001.

[16]*Johnson v. State*, 584 A.2d 1158 (Del. 2004).

[17]Mr. Caulk asserts counsel should have deposed Mr. Bowe because his "statements to police were manipulated, coerced and inaccurate."

interviewed by counsel for the individual who is accused of robbing and assaulting them, the Defendant fails to indicate how the outcome of the trial would have been affected if counsel had performed this task. The Defendant further asserts counsel did not visit the crime scenes, rendering him ineffective to question the officer about the victims' injuries. Again, Mr. Hillis's affidavit indicates an investigation was unnecessary to effectuate Mr. Caulk's defense, and the Defendant offers nothing to indicate a visit to the scenes would have altered the outcome or would even have been of assistance to counsel in performing his responsibility.

Because the above claims are conclusory, they fail. Mr. Caulk has put no evidence before this Court to indicate he was prejudiced in anyway by the actions or inactions taken by trial counsel, nor has he shown that counsel acted unreasonably. Once again, the Defendant has the burden of showing that there exists a "reasonable probability of a different result but for trial counsel's errors,"[18] and that is simply not present in this case. For these reasons, the Defendant's motion regarding ineffective assistance of trial counsel is without merit.

[18] *Anderson v. State,* 2002 WL 187509 (Del. Super. Ct.), *3 (citing *Strickland*, 466 U.S. at 688-689).

### D. Ineffective Appellate Counsel

9. Mr. Caulk also asserts his appellate counsel, Mr. Hillis, failed to file a viable direct appeal with respect to the Defendant's conviction and sentence. Specifically, Mr. Caulk asserts the appeal should have included claims with respect to the denial of the Court to sever charges as they relate to the two victims, Mr. Bowe and Mr. Rogers. However, grounds for appeal are left to the discretion of counsel,[19] and here there is no basis to find that counsel's strategic decision to challenge only the sufficiency of the evidence in anyway prejudiced the defendant. An appeal is not a process to merely throw all possible claims against a wall in hopes that one sticks. Counsel is expected to determine which claims have merit and argue those claims on appeal.[20] There is no evidence before this Court that this procedure was not followed reasonably by appellate counsel. As a result, Defendant's motion with respect to ineffective assistance of appellate counsel is denied.

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[19] *State v. Wilson*, 2003 WL 21524696 (Del. Super. Ct.), *5 ("A strategy that structures appellate arguments on 'those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy.'"; *quoting Flamer v. State*, 585 A.2d 736, 758 (Del. 1990)).

[20] *Id.*

## Abuse of Discretion[21]

10. Lastly, Mr. Caulk asserts the trial judge abused his discretion when denying the Defendant's motion to sever the counts relating to Mr. Bowe from the counts relating to Mr. Rogers. Pursuant to Superior Court Criminal Rule 8(a), two or more offenses may be charged in one indictment.[22] This Rule should be interpreted together with Superior Court Criminal Rule 14, which states that if a defendant will be prejudiced by this joinder, the court may order a separate trial for each count.[23] It is the defendant's burden to show that a prejudicial effect is present sufficient to outweigh the interest of judicial economy.[24] It is within the discretion of the trial court to make that determination, and the mere assertion of hypothetical prejudice

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[21]Pursuant to Rule 61(i)(3), if the defendant does not address an issue on direct appeal, the claim is barred unless the defendant shows cause for relief and prejudice from the violation of his rights. While here the Defendant did not file an appropriate appeal relating to the severance of charges, because he is claiming that appeal was not filed based on the ineffectiveness of counsel, it is proper for this Court to address this assertion directly.

[22]Super. Crim. R. 8(a) states:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

[23]Super. Ct. Crim. R. 14 states, in pertinent part:

> If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

[24]*State v. Hammons*, 2001 WL 1729119 (Del. Super. Ct.), *2 (citing *Younger v. State*, 496 A.2d 546, 549-50 (Del. Super. Ct. 1985)).

will not suffice.[25] Lastly, the denial of a motion to sever the charges is appropriate when "offenses are of the same general character, involve a similar course of conduct and are alleged to have occurred within a relatively brief span of time."[26]

Here, the Defendant's charges are of the same general character. Each involves an assault with a dangerous instrument. Further, the two incidents took place within about fifteen minutes, and a block or two apart. And while the Defendant asserts the jury would not be able to resist the cumulative effect of the two incidents, there is simply nothing to support this assertion. Because it is the Defendant's burden to overcome the assumption that these two incidents can be fairly joined, and because he failed to show that a substantial prejudice to his defense would be present if the charges were joined, the motion to sever was rightfully denied. Thus, Mr. Caulk's final claim is also without merit.

11. For the foregoing reasons, Mr. Caulk's Motion for Postconviction Relief is hereby denied.

IT IS SO ORDERED.

Judge William C. Carpenter, Jr.

[25] *Id.*

[26] *Id.* (citing *State v. Garden*, 2000 LEXIS 415 (Del. Super. Ct.)); see also *State v. Washam*, 2003 WL 178772 (Del. Super. Ct.).